IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 436

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MOBILE GAS SERVICE CORPORATION AND FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 7, 1954 (App. 17) reversing judgment and decision of Respondent Federal Power Commission[1] entered in Docket G-2227 against Respondent (App. 18)[2] and ordering the Commission to reject a filing by Petitioner in a different proceeding, under Section 4 of the Natural Gas Act[3] and to order refunds by Petitioner to Respondent Mobile Gas Service Corporation of amounts collected under such filed rates.

Opinions Below

The Commission issued an order containing its opinion and conclusions (App. 18). The majority and dissenting

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[1] Referred to hereafter in this petition as the Commission; Mobile Gas Service Corporation, referred to hereafter as Respondent.

[2] The record certified from the Court below will be referred to as R, the appendix to this petition, as App.

[3] Hereinafter called the Act.

opinions of the Circuit Judges of the Court of Appeals (not yet reported) styled *Mobile Gas Service Corporation* v. *Federal Power Commission*, are contained in the appendix filed herewith (p. 1-16).

Jurisdiction

The judgment of the Court of Appeals was entered September 7, 1954 (App. 17). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

Urged as reasons for granting petition.

1. Whether Congress in enacting, pursuant to the Commerce Clause, the complete and exclusive scheme of regulation of the Natural Gas Act, intended and provided that a private contract fixing rates subject to the jurisdiction of the Federal Power Commission and filed with said Commission as a rate schedule, should render inoperative and unenforceable the filed rate provisions of Section 4 of said Act so that a natural gas company cannot make or file with the Commission the change in rates contemplated and required by Section 4(d), and so that the Commission cannot permit or accept, but must reject, the filing of change in rates by the natural gas company until first such private contract is set aside as against the public interest in a proceeding brought for that purpose.

2. Whether Congress in the Natural Gas Act has empowered the Federal Power Commission by its own order, or authorized the courts to direct the Commission by order, to require refund of monies collected from a change in rates for the sale of natural gas for resale for industrial use only filed by the natural gas company pursuant to Section 4(d) of the Act, but not subject to suspension under Section 4(e) of said Act.

Statute Involved

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, Ch. 556, 52 Stat. 821, as amended; 15 U.S.C. 717, et seq) are set forth in the appendix filed herewith (p. 24-27).

Statement

The Proceeding before the Federal Power Commission

On August 14, 1946, Petitioner filed Supplement No. 10 to Supplement No. 7 of "Rate Schedule F. P. C. No. 20" with the Commission effective July 26, 1946 (R. 153). After the effective date of the Act, the original contract dated January 1, 1936, was filed as rate schedule with the Commission on August 22, 1938 (R. 111).

Supplement No. 10, dated June 28, 1946, provided for additional delivery of gas under Article VI, Supplement No. 7 (R. 137) for resale for industrial purposes only to Respondent's customer Ideal Cement Company, pursuant to a 10-year contract, reduced the price from ninety per cent (90%) to eighty per cent (80%) of the proceeds received by Respondent during applicability of its rate to Ideal, and contained a tax adjustment clause for reimbursement to Petitioner of additional taxes which might be imposed (R. 154-7).

The Commission permitted Supplement No. 10 to be filed and become effective upon this caveat:

> "Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act as amended; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice affecting such service or rate provided for in the above designated schedule, nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate" (R. 78).

The effect of the caveat was to restrict the filing of Supplement No. 10 to a rate filing, subject to changes or modifications in said rate permitted by provisions of the Natural Gas Act which the law imported into said Supplement and Contract.

Thereafter, on October 30, 1948, the Commission issued Order No. 144, amending its general rules and regulations which provided for a conversion tariff which required all rates to be stated in dollars and cents and prohibited percentage and tax agreements and adjustments which were the heart of Supplements 7 and 10.[4]

The Commission on August 1, 1952, permitted Petitioner's conversion tariff to be filed (R. 81-86). Thus, from that date forward the conversion tariff replaced and superseded the contract rate; and became the only legal and permissible rate for the service theretofore rendered Respondent by supplement 10 to supplement 7.

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[4] Under heading "Restatement of Schedules Filed Prior to December 1, 1948" (thus applicable to the original contract and supplements 7 and 10), §154.81 made the new rules expressly applicable to all "effective schedules of rates * * * and contracts for the transportation or sale of natural gas subject to the jurisdiction of the Commission filed prior to December 1, 1948" not prepared in accordance with §§154.31 through 154.41. §154.82 provided:

> "REQUIREMENT FOR RESTATEMENT. All effective schedules of rates * * * and contracts not prepared in accordance with §§154.31 through 154.41 shall be restated and filed as parts of the tariff in accordance with said sections on or before the date specified in §154.83, and duly posted at the time of filing: Provided, however, that price provisions which cannot be restated in cents or in dollars and cents per unit as required by §154.38(d) without effecting a change in rates or charges may be retained in effect without change, Provided, further, that when necessary, pending completion of restatement within the time provided for by Section 154.83 schedules may be filed in accordance with this part as in effect prior to December 1, 1948."

The required restatement pursuant to Section 154.38(d) (3) provided:

> "No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost, adjustment clauses, or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural gas company may state in the service agreement or in the rate schedules filed pursuant to §154.52 that it is or will be its privilege under certain specified conditions, to propose to the Commission a modification, change, or substitution of the then effective rate or charge: Provided, further, that no such clause may effectuate a change in an effective rate or charge except in the manner provided in Section 4 of the Natural Gas Act, as amended, and the regulations in this part."

On June 24, 1953, Petitioner, at Docket G-2210, filed application under Section 4(d) for increased rates including rates for gas sold Respondent for resale for industrial use only. By order issued July 10, 1953 (R. 90-94) the Commission, *inter alia*, ordered hearing on such rates applicable to Respondent, further holding they "are not subject to suspension," hearing to begin July 20, 1953; consolidated said case with several pending proceedings[5]; permitted such increased rates to become effective on July 25, 1953.

On July 16, 1953, Respondent moved to intervene in Docket G-2210, as consolislated (R. 95-7), but did not raise the contentions made here.

On August 7, 1953, in Docket G-2227, an independent proceeding[6], Respondent collaterally attacked the order of

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Section 154.85 provided:

"STATUS OF CONTRACTS FILED AS RATE SCHEDULES AND RESTATED. Each contract which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms, or is replaced by an executed service agreement in a form contained in the tariff. PROVIDED, HOWEVER, that the natural gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate which are to remain in effect; PROVIDED, FURTHER, HOWEVER, that schedules and general terms and conditions of the tariff, and agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff."

Statement pursuant to a 154.85 of Respondent's contract was filed as required (R. 79-80) showing the vast changes these rules wrought in Respondent's contract, aside from the caveat of the order permitting them to be filed. The Court erroneously fails to recognize these changes. Thus the contract which the Court below requires the Commission to honor is no longer operative, and has not been since July of 1952, when the Commission in Docket G-2019 permitted the tariff successor to the contract to be filed (R. 81). Respondent took no 19(b) appeal from this change in its contract by which it is bound. *Sunshine Anthracite Coal Co.* v. *Atkins*, 310 U.S. 381.

[5] These proceedings involved other rate increases for services other than the service to Respondent and also included consolidation with Docket G-1142, being an investigation under Section 5(a) of the Act instituted by the Commission October 12, 1948 (R. 88) involving all of petitioners' rates.

[6] This was first filed on August 4, 1953, in Docket G-2210, et al; but on August 7, 1953, Mobile requested deletion of the consolidated docket numbers and the granting of a separate filing with a new docket number, which the Commission granted (R. 30, 31, 25-7, 28-9, 10-25).

July 10, 1953, issued in Docket G-2210; and, in the absence of all parties to Docket G-2210 and the consolidated dockets, sought the Commission to set aside, annul or modify and amend the order of July 10, in the following particulars:

(1) Annul and set aside that part permitting the filing of first revised sheet 40 and second revised sheet 39 covering sale for resale for industrial purposes only to Respondent and substitute a rejection;

(2) Cancel, annul and set aside that part setting Docket G-2210 and consolidated dockets for hearing beginning July 20, 1953, and substitute an order severing Docket G-2210 and providing a hearing solely on revised sheets 39 and 40 applicable only to Respondent;

(3) Annul, cancel and set aside paragraph (D) and substitute a paragraph expressly denying effectiveness to revised sheets 39 and 40 on July 15, 1953; and

(4) Insertion of a new decree directing Petitioner to refund Respondent the difference, if any, between the claimed contract rates and the rates finally allowed in Docket G-2210.

The Commission, after granting Petitioner's right to intervene, correctly refused this relief upon the following grounds (R. 3-9):

(1) Rejection was denied because filing was pursuant to, and in conformity with, Section 4 of the Act, the only section by which a rate increase could be initiated, and which also prohibited suspension of industrial resale rates;

(2) No good cause for separate hearing shown while the contrary appeared, particularly due to Docket G-1142, a 5(a) proceeding investigating all rates of Petitioner, the Commission's discretion and experience being that such consolidation and joint hearing was more reasonably calculated to permit full and proper consideration, and that Petitioner had already offered its direct case;

(3) Refusal to permit revised rates to become effective would be improper; the Commission had clearly reserved both its right and intent to examine into reasonableness and propriety of the proposed rates; called attention to the caveat of Section 154.23 of its rules (generally similar to the caveat in the orders quoted above; and

(4) Denied insertion of provisions for refund because Section 4(e) permitted refunds only of suspendable rates, whereas these were non-suspendable industrial rates.

The Judgment Of The Court Of Appeals

Respondent filed a petition for review, pursuant to Section 19(b) of the Act to set aside the Commission's order (R.65). The Commission appeared in defense of its order.

On September 7, 1953, the Court of Appeals in an opinion written by Judge McLaughlin and concurred in by Judge Staley, with Judge Hastie dissenting, set aside the Commission's order which rejected Mobile's petition in Docket G-2227, and directed the Commission to amend its order of July 10, 1953, in Docket G-2210 to reject the filing of the revised sheets insofar as they affected the Ideal Cement Company contract, further directing the Commission to amend paragraph (D) thereof so as to deny permission for the revised schedule to take affect. The Court held that the Commission should have rejected the filing until it had first determined the reasonableness or unreasonableness of the "existing" contract rate, and that all monies collected on the basis of the "void" order were unlawfully collected and should be returned to Respondent (App. 16).

The dissent of Judge Hastie was:

> "The Commissions order of July 10, 1953, was lawful and proper under the terms and scheme of the Natural Gas Act. This Court now is requiring that order to be changed in a way which, in my view, causes the Commission to exceed its authority under the Act. Accordingly, I dissent." (App. 16)

Reasons For Granting The Writ

This is the first case in which this Court has been called upon to consider whether Section 4 of the Natural Gas Act which this Court has called the "heart of the new regulatory system",[7] establishes a comprehensive, exclusive scheme of regulation which provides that change in rates, filed by the natural gas company pursuant to Section 4(d) and permitted by the Commission to become effective as the filed rate pursuant to the provisions of Section 4(d) and 4(e), is superior to and supersedes rates fixed by private contract theretofore filed with the Commission as a rate schedule. The decision below squarely presents broad and highly important questions of interpretation of the principal affirmative provisions of Section 4 of the Act in such way, Petitioner submits, as to nullify the provisions of Section 4. Petitioner accordingly submits that the Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court, and has decided them in a way which will have such extreme effects on the administration of a vital federal statute as to call for review by this Court. Too, the decision is not only in square conflict with decisions of other Courts of Appeal in the same matters, but also presents an "intra-circuit conflict" of a type for which this Court has granted review. *Dickinson* v. *Petroleum Conversion Corp.* (1950) 338 US 507, 508; *John Hancock Insurance Co.* v. *Bartels* (1939) 308 US 180, 181. Petitioner further suggests that the Court of Appeals has reached a result not consonant with the applicable decisions of this Court.

Finally, Petitioner submits that the statutory scheme of regulation is so disrupted by the decision of the court below as to be destructive of the Congressional purpose. As the statute presently is, the natural gas company is obligated to initiate rate changes for Commission consideration pur-

[7] *Federal Power Commission* v. *Hope Natural Gas Company* (1944), 320 US 591, 611.

suant to Section 4(d), whenever and as often as necessary to meet the obligation of Section 4(a) that all rates at all times shall be "just and reasonable"; as the statute is changed by the decision below, the onus is taken from the natural gas company and placed on the Commission to institute a proceeding against each contract filed whenever and as often as necessary to meet the obligation of Section 4(a) and 5(a) of "just and reasonable" rates. Since all rates charged or services rendered subject to the jurisdiction of the Commission are necessarily by contract, whether a common law contract like Respondent's or not, the sweep of the decision below destroys all duties and rights of the natural gas company to initiate change in rates; produces a vacuum in the Act respecting this duty; and substitutes for it the Commission's duty under Section 5(a), which does not permit an increase in rates. This is an intolerable burden which the Commission clearly is not prepared to undertake.

As the statute is written, the natural gas company does not have capacity or power by private contract to prevent the comprehensive exclusive regulation provided by the Act; but as re-written by the decision below, the natural gas company may make contracts which for all practical purposes remove it from regulation under the Act. The natural gas company cannot initiate a 5(a) proceeding; the distribution company asserting a contract, could not be expected to; and the consequent burden on the Commission to initiate a 5(a) proceeding would be overwhelming, if not impossible, when considered in the light of the volume of the Commission's statutory activities. The resulting confusion and futility which would result from displacement of the statutory scheme of regulation is further illustrated by the Commission's present extension of its rate regulatory jurisdiction to independent producers. It has been estimated that there are a minimum of 6,000 contracts which

will thus become subject to such jurisdiction.[8] Under the decision below, the Commission would be forced to proceed against each contract and abrogate it as against public interest before its regulatory control attached. Congress intended that Section 4 should be the cornerstone of the Act; not that it should become the means of frustration of the even regulation intended. Petitioner submits that these matters all furnish additional appropriate reasons for granting the review requested.

Finally, the dissent of Judge Hastie pointedly states that the decision below requires the Commission to change the order of July 10, 1953 (issued in a different and distinct proceeding), in a way "to exceed its authority under the Act." Petitioner submits that this alone is warrant for this Court to grant review.

I.

The most sweeping part of the decision, and the one which, if followed, will have the most disrupting — even destructive — effect on the "new regulatory system" of the Act, is that which holds that a contract fixing rates filed with the Commission as a rate schedule is not subject to the provisions of Section 4 respecting change of rates; but renders that Section ineffective and unenforceable until said contract is abrogated as against public interest in a proceeding brought for that purpose.[9] This holding was reached by a process of reasoning founded on a misconcep-

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[8] The Commission issued order 174-A on August 6, 1954, requiring the filing by independent producers of sales contracts as rate schedules. Commissioner Digby in his dissent to such order said:

> "The order further requires all of these producers to make application to the Commission for Certificates of Public Convenience and Necessity authorizing each and every separate sale in interstate commerce. It has been repeatedly stated that there are 2,000 such independent producers. Most of these producers who are selling gas in interstate commerce will have an average of three separate sales which require a minimum of 6,000 applications for Certificates of Public Convenience and Necessity to be filed with the Federal Power Commission * * *, and this in addition to the filing of all sales contracts under the rate provisions of the order."

[9] First question presented.

tion of the purpose and meaning of the affirmative provisions of the Act and contrary to the express provisions of the Act. If carried to its logical conclusion, such reasoning destroys and repeals Section 4, for all rates depend on contract, whether "common law," by virtue of a signed service agreement, mere service acceptance, or otherwise; thus, such holding strikes down the continuing statutory duty of the natural gas company to initiate changes in rates to meet the "just and reasonable" prescription of Section 4(a) and deletes the discretionary choices given the Commission by Sections 4(d) and (e) in administering the regulatory duties exclusively given it by the Act.

1. The Court's holding seems clearly to nullify the plain language of Section 4(d) that "no change shall be made *by any natural gas company* in any such *rate* * * * or *contract* relating thereto, *except* after thirty days' notice to the Commission *and to the public*."[10] Only the natural gas company is authorized by the Act to initiate change in an existing rate. In fact, it is the duty of a natural gas company to propose such changes.[11] Section 4(d) does not, as the decision below held, prohibit a change "until first" the Commission has a "proceeding" to destroy the current rate.

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[10] The 4(d) phrase "any such rate * * * or contract" clearly refers to the Section 4(c) "Schedules showing all rates and charges * * * together with all contracts which in any manner affect or relate to such rates, charges * * *" required to be filed with the Commission. This in turn must be read with the Congressional policy set up in Sections 4(a) and 4(b) which is the only bridle on Commission freedom in considering propriety of rates. They provide that all rates under the Act shall be "just and reasonable." The language is in the affirmative, and prohibits as "unlawful" all rates not meeting this standard. "Just and reasonable" is further defined as being free from taint of "undue preference or advantage," or "unreasonable difference(s) * * * between localities * * * or * * * classes of service." Thus administrative duty under Section 4 is statutorily confined to the ever recurring and continuing duty of "just and reasonable" prospectively; not to the sterile and negative determination of "unreasonableness" or "against public interest" as the key to unlock performance of the duties enjoined by Congress upon the Commission in Section 4.

[11] *Pennsylvania Water & Power Co.* v. *Consolidated G.E.L. Co.* (1950, 4 Cir.) 184 F. 2d 552, cert. den. 340 US 906; *Montana-Dakota Utilities Co.* v. *Northwest Public Service Co.* (1951) 341 US 246; *Hope Natural Gas Co.* v. *F.P.C.* (1943 4 Cir.) 134 F. 2d 287, reversed on other grounds, 320 US 591; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* (1907) 204 US 426; *United States* v. *Illinois Central Railway Co.* (1924) 263 US 515.

It expressly contemplates change and modification in contract rates without a proceeding against current filed rates; for its forbids change by the natural gas company in "contract(s)" only where the thirty days' notice is not given. In other words, Section 4(d) expressly declares that "contracts" relating to rates shall be subject to change by the filing (and giving thirty days' notice) by the natural gas company. This notice is required solely from the natural gas company, for Section 4(d) gives discretion to the Commission to permit change in rates and contracts without notice or hearing "for good cause shown." It is the only statutory notice to which Respondent was entitled from Petitioner.

Had the Court below given this plain language the consideration it requires, it would not have declared that Respondent's contract was being changed "without any statutory notice" (App. 6). Respondent was required at its peril to obey the sanction of this notice for the provisions of the Act and the actions of the Commission thereunder respecting rates are equally binding upon it and Petitioner.[12] The Court did not define or identify in the Act the "statutory notice" referred to. There is no statutory notice defined or provided for as to change in rates or contracts affecting rates save that of Section 4(d), which here was admittedly given.

The discretion to the Commission in Section 4(d) to "allow changes to take effect without requiring the thirty days' notice herein provided for * * *" is completely destructive of the Court's reasoning, for if Congress had intended that some notice outside the Act followed by a Section 5(a), or any other, proceeding, were pre-condition to a change in a

[12] *Montana-Dakota Utilities Company* v. *Northwestern Public Service Co.* (1951) 341 US 246, affirming *Northwestern Public Service Company* v. *Montana-Dakota Utilities Co.* (1950, 8 Cir.) 181 F. 2d 19, 22; *Colorado Interstate* v. *Federal Power Commission* (1945) 324 US 581, 597; *Hope Natural Gas Company* v. *Federal Power Commission* (1943, 4 Cir.) 134 F. 2d 287, 311, reversed on other grounds 320 US 591; *Woolrich* v. *Northern Pacific Railway Co.* (1934, 8 Cir.) 71 F. 2d 732; *Watab Paper Co.* v. *Northern Pacific Railway* (1946, 8 Cir.) 154 F. 2d 436.

"contract" relating to rates, surely it would not have vested its statutory administrative agent with power to permit change and destruction of all "contract(s)" relating to rates without notice and hearing subject only to the statutory prescription "for good cause shown."

Instead the Court proceeded in the teeth of 4(d) language to require rejection and dismissal of the filing and to order refunds — all prohibited by the Act. The opinion reasoned "to do otherwise would be an attempt by us to legislate judicially since the construction of Section 4(d) as contended for by the Commission and the Intervener is not warranted by the statutory language." But to reach the result declared, the court below falls into the very judicial legislation it condemned, for there must be both deletion and addenda to Section 4(d) if the Act is to support its holding. The express direction for change or destruction of contracts relating to rates by the filing by the natural gas company followed by the thirty days' notice, and the power to the Commission to permit such change without notice or hearing, must be deleted, and there must be added provisions affirmatively ordering the Commission to reject all filings by a natural gas company if there be contract rates until such time as a hearing is had to determine whether "on the facts such contracts are against public interest." Further, there would have to be added other provisions affirmatively authorizing and ordering the Commission to require refunds.

The Court produces further confusion by failing clearly to specify under what section of the Act a hearing can be had. Obviously, not under Section 4, which gives discretion to the Commission whether there shall be a hearing, nor is the distributor-purchaser (sic, Respondent) one of the class authorized by Section 4(e) to complain and thus force choice of the administrative discretion whether to hear. The ordered rejection of filing removes possibility of a 4(e) hearing, for filing pursuant to 4(d) is essential to require

the Commission to exercise its discretion. Clearly, Section 4(e) refers only to a hearing on proposed new rates after they are filed, and gives no power over rates superseded by the proposed filing. Thus, Section 4(e) does not warrant the hearing which the holding requires.

Section 5(a) authorizes a hearing only upon complaint that a filed and effective rate is "unjust, unreasonable, unduly discriminatory, or preferential * * *." If unreasonableness be found, the Commission is empowered to lower the rate or to fix a just and reasonable rate thereafter to be charged, with express denial of power to order an increase "unless such increase is in accordance with a new schedule filed by such natural gas company." The natural gas company is not one of those authorized to initiate a 5(a) hearing by filing a complaint. It seems obvious that whether a contract should be set aside as prelude to rate regulation, as the court below holds, is not within the competence of 5(a). The Act nowhere intends or contemplates such a hearing. Section 5(a) not authorizing a hearing on whether a contract is against the public interest as prelude to a filing under 4(d), the Court holding the natural gas company is not permitted to file any increase because of a contract and the Commission being expressly denied power in 5(a) to increase a rate, the decision below effectively and completely destroys right or power to change or increase rates which are provided for in contracts.

Thus where there are contracts, the decision emasculates Section 4 entirely, and produces a gap in the Act forbidding regulation entirely. Congress did not intend this; nor does the Act so warrant, for Section 4 rightly read provides that contracts constitute no impediment, but are subject to change as any other rate. Choice of the Commission's discretion between contract or proposed rate, or any other rate level, is always embraced within the monolithic "just and reasonable." "Just and reasonable" involves an area from the lowest level (below which rates would not be just and reasonable because confiscatory) and the highest level

(above which unreasonableness would occur because too high) the plane selected being given to the exclusive discretion of the Commission.[13] Petitioner and Respondent alike are entitled to, and bound by, that rate as just and reasonable which is made specific by the Commission.[14] Neither familiar concepts nor the original cost method followed by the Commission, nor Sections 4 or 5 are based or dependent on "circumstances" or "inducements"[15] under which rate agreements are reached; rather there is involved "the

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[13] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 US 246; *Cities Service Gas Co.* v. *F. P. C.* (1946, 10 Cir.) 156 F. 2d 694, 698-9, Cert. den. 329 US 773.

[14] Thus contract filed rates may continue only so long as they occupy the plane selected by the Commission. No rate contract, fixed or otherwise, is rendered unimpeachable because "accepted" or "approved" by the Commission; nor does it thereby attain status not subject to change. *F. P. C.* v. *Hope Natural Gas Co.* (1944) 320 US 591, 615.

[15] The majority opinion refers to Respondent's contract as "recognized as late as July, 1952" (the date of the filing of increased rates) (App. 2); as an "existent unchanged approved contract"; (App. 3, Fn 3) "the accepted contract" (App. 5). It is submitted these holdings are contrary to the record. In this respect Respondent's contract is precisely like that in Tyler Gas Service Company (R. 101) discussed in Footnote 3, (App. 3) of the opinion. The record shows that the particular supplemental contract relied on by Respondent was permitted to be filed by the Commission with this caveat:

> "Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act as amended, nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such service or rate provided for in the above designated schedule, *nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate.*" (R. 77-8) (Emphasis supplied).

This is not acceptance, recognition or commitment to approval of the position Respondent claimed. It is express refusal and denial to so consider the contract, notifying Respondent that the contract is accepted only in respect of the rates presently effective. See *Mississippi River Fuel Co.* v. *F.P.C.* (1941, 8 Cir.) 121 F. 2d 159. The Act would be imported into the contract in any event, and thus the caveat plus the Act expressly was an acceptance of the contract subject to changes provided by the Act.

Too, pursuant to the Rules of the Commission (see Fn 4, p. 4-5) a statement was filed pursuant to the requirement of Section 154.85. This statement (R. 79-80) shows the vast changes made in the contract. Thus the current filed rates at the time Petitioner filed the application in G-2210 for increase were not those of the contract, but those of the conversion tariff. The majority opinion ignored these orders and their effect. Replacement of Respondent's contract with the conversion tariff is thus in precisely the same situation as that in the Tyler Gas Service Company case, which the majority opinion characterized as an "adversary" proceeding against the Tyler contract (App. 3 Fn 3).

making of 'pragmatic adjustments'."[16] The Act does not specify that a Section 4(d) filing can be had only after a proceeding in which a contract rate is found to be unreasonable or against public interest. Clearly here the Commission has been ordered to substitute the Court's judgment not only as to how the Commission may proceed to find "just and reasonable," but what is "just and reasonable" — a holding squarely in conflict with the well-settled rule that the courts may not so substitute their judgment for the administrative decision, because that determination and decision is given exclusively to the Commission.[17]

The direction in this collateral proceeding to the Commission to recall its order in Docket G-2210 setting a 4(e) hearing[18] is equally in conflict with the well-settled rule that an application for increased rates may not be dismissed without a hearing.[19] This part of the decision requires the Commission to violate the Act, and deprives Petitioner of rights guaranteed by the Act.

Further violence to the Act is illustrated by the attempted distinction of the *Tyler* case (Fn. 3, Op. App. 3) which proceeds upon the assumption that since the *Tyler* rates were *suspended under bond*, protection was adequate to the contract rates. But the Court was without right to assume that all rates other than resale industrial would have a 4(e) suspension, for whether there shall be either suspension or

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[16] *F.P.C. v. Natural Gas Pipe Line Co.* (1942) 315 US 575, 586; *F.P.C. v. Hope Natural Gas Co.* (1943) 320 US 591, 602.

[17] *Colorado Interstate Gas Co. v. F.P.C.* (1945) 324 US 581; *F.P.C. v. Hope Natural Gas Co.* (1944) 320 US 591; *Panhandle Eastern Pipe Line Co. v. F.P.C.* (1945) 324 US 635; *F.P.C. v. Natural Gas Pipeline, supra; Montana-Dakota Utilities Co. v. Northwestern Public Service Co., supra.*

[18] The Commission's order of December 7, 1953, from which Respondent appealed, shows the hearing on the consolidated dockets, including Docket G-2210 (the 4(e) hearing on increase to Respondent) and G-1142 (the 5(a) proceeding involving all of Petitioner's rates) had then proceeded to the point where Petitioner had presented its direct case in support of the filing in Docket G-2210 (App. 8).

[19] *F. P. C. v. Natural Gas Pipeline Company* (1942) 315 US 575, 583; *Atchison, Topeka & Santa Fe v. U. S.* (1932) 284 US 248, 262; *Ohio Bell Telephone Company v. Public Utilities Commission* (1937) 301 US 292; *Morgan v. U.S.* (1936) 298 US 468.

refund requirement is discretionary with the Commission. Under the reasoning of the Court, failure to suspend or require refunds would produce another gap in the Act identical with that resulting here. Furthermore, the distinction impliedly concedes lack of necessity for a contract hearing by the suggestion that refund provisions of 4(e) are adequate protection; but refund is not based on the superseded contract rates, it is the difference, if any, between the proposed new rates and those the Commission ultimately finds to be just and reasonable. The distinction, then, seems to recognize what Petitioner insisted, i.e., that contract rates are nothing more than evidence relevant to Commission determination of the ultimate issue of "just and reasonable," which determination is adequate protection procedurally and substantively to the "contract." That evidence of contract rates for Commissoic consideration in arriving at "just and reasonable" is sufficient guarantee of protection to "contract rights" is conclusively shown by the language of Section 4(e), also ignored by the majority opinion, which provides that after the 4(e) hearing, "the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective." This language gives the Commission all the powers it possesses under Section 5(a).[20]

No resale purchaser, such as Respondent, is permitted to file the 4(e) complaint which authorizes the Commission to order a hearing on a 4(d) filing; that is limited to any State, Municipality, or State Commission — — regulatory authorities at the local level.[21] In Section 5(a), however, which provides for a hearing upon the complaint of unreasonableness of an existing filed rate, Congress carefully added to the governmental protectors of the public interest the "gas

[20] *Hope Natural Gas Co. V. Federal Power Commission* (1952, 4 Cir.), 196 F. 2d 803, 805; *Northern Natural Gas Co. v. Federal Power Commission*, 8 Cir., not yet reported, decided August 17, 1954, in cases #14706 and 14733 at page 11 of the opinion.

[21] Of course a municipality may own and operate its own distribution system, but this would merely be incidental to the obvious design of the Section.

distributing company" as one authorized to file such a complaint. This selective handling by Congress demonstrates the impropriety of the decision below, for surely if, as adjudged, a contractee such as Respondent has a "common law" standing superior to "statutory regulation" until the brake of its "common law contract right" is released, the right under Section 4(e) to apply that brake to proposed rates effecting change in contract rates would have been statutorily specified.

No basis exists for the assumption, which the footnote on *Tyler's* case suggests, that Congress intended power under 4(e) to suspend rates other than industrial or to order refunds, should be in lieu of the hearing here ordered. If so, Congress then would have required suspension of rates for resale for industrial use only, and made the suspension of Section 4(e) obligatory, not merely discretionary. Common law contracts for resale for industrial use have equal dignity at the law with domestic resale contracts. If the Court intends a difference, additional insertion of addenda in 4(e) is immediately required. If there be no difference, then the Court's reasoning does not merely emasculate Section 4, it strikes it down; because Section 4(e) then would contain an invalid and unreasonable classification. The Court's reasoning gives no answer for the situation where the Commission elects not to suspend under 4(e).

Apart from judicial review, this Court has made it abundantly clear that the Act is for the Commission to administer, that the courts may not interfere with the Commission's exercise of that power, nor substitute their judgment for that of the Commission.[22] Yet the Court below directs action contrary to the authority of the Act and requires issuance of orders contrary to the plain statutory provisions. This is not judicial review; it is legislative substitution of judicial judgment for administrative judgment.

[22] *F. P. C. v. Hope Natural Gas Company* (1944), 320 U.S. 591, 617; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* (1951), 341 U.S. 246, 251; *Colorado Interstate Gas Co. v. F. P. C.* (1945), 324 U.S. 581, 589.

which this Court has said is exclusively vested in the Commission.

The effect of this decision is to produce multiplied confusion and uncertainty in the areas of applicability of the Act and the Commission's jurisdiction under it as well as to destroy the ability of the natural gas company to meet the duty imposed on it by Section 4. There is no basis for the statement that Petitioner seeks "under the cover of the Act to avoid its contractual duties."[23] Against the preemptive nature of the Act, Petitioner was without power to make a contract contrary to the provisions thereof, nor could it thereby escape performance of those duties which Section 4 obligated it to perform. Petitioner must comply with the Act.

The effect of this decision is to destroy regulation applicable to all alike and require the Commission to regulate separately each individual contract. Thus the dissent of Judge Hastie is sharp and pointed, for without doubt the Commission's order was lawful and proper within the Act; and the Court's requirement of rejection and refund prescribes Commission action contrary to the ambit of the Act.

2. The conclusions of the Court are also in conflict with other Courts of Appeal. The holding that contract provisions and rights are not subject and inferior to the provisions of the Act but are controlling over the regulatory scheme until found to be against the public interest in a proceeding brought for that purpose is clearly inconsistent with the decision of the Fifth Court of Appeals in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1945),

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[23] When this suggestion is considered in the context of the entire opinion and in the light of the plain meaning and intent of the Act it brings to mind the complaint of Judge Holmes:

> "What complications involve us if we try to do justice according to our idea of what is right though not within the framework of the law". (153 F. 2d at page 860.)

162 F. 2d 388, cert. den. 332 US 770.[24] There the Court held that a "favored nation" clause for a lower rate contained in a contract became "inoperative" after passage of the Act; that while Section 4 placed the "burden" on the natural gas company to file a new schedule, Section 5 gave adequate remedy and right to the distribution company, by complaint, to have determined whether a rate was proper under the terms of the Act. No special proceeding against the contract was suggested.

Michigan Consolidated Gas Co. v. *Panhandle Eastern Pipe Line* (1949, 6 Cir.), 173 F. 2d 784, affirming (D.C.E.D. Mich. 1948) 80 F. S. 27, also holds that contract provisions lose their force to the extent they conflict with orders or regulations of the Commission with no suggestion of special proceedings against the contract.

In *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1941, 8 Cir.) 121 F. 2d 159, the filed contract contained an escalation clause for increased rates to be effective after January 1, 1940. The Commission suspended the natural gas company's application for the increased rate and, upon hearing, refused to approve the increased contract rate and continued in effect the pre-escalation contract rate. Mississippi then appealed under Section 19(b) claiming priority and superiority of its contract rate, but the Court held the contract and its rates subject to regulation in the public interest and disposed of it in a 4(e) proceeding without requiring a special proceeding or one under 5(a).

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[24] It is well settled that contracts and rates thereunder are inferior and subject to regulatory statutes, and are invalid and unenforceable to the extent they conflict with the statutory regulation. *Union Dry Goods Co.* v. *Georgia Public Service Co.* (1919) and cases cited, 248 US 372. Where Congress acts the Commerce Clause and preempts the field as in the case of the Interstate Commerce Act (from which the Natural Gas Act was so largely taken) and the Natural Gas Act, private contracts are without force against the statutory scheme. *Armour Packing Co.* v. *United States* (1908) 209 US 56; *New York N H & H Ry. Co.* v. *I.C.C.* (1906) 200 US 361; *New York* v. *United States* (1922) 257 US 591. Rules applicable to the Interstate Commerce Act thus apply to the Natural Gas Act. *Hope Natural Gas Co.* v. *F.P.C.* (1952, 4 Cir.) 196 F. 2d 803, 807; *Pennsylvania Water & Power Co.* v. *Consolidated Gas Electric Light & Power Co.* (1950, 4 Cir.) 184 F. 2d 552, cert. den. 340 US 906.

The conclusion of the Court below that the Commission should have rejected Petitioner's filing here is clearly inconsistent with its former opinion in *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1953) 202 F. 2d 899, and this "intra-Circuit conflict" alone makes this case a proper one for review by this Court. *John Hancock Insurance Co.* v. *Bartles* (1939) 308 US 180, 181; *Dickinson* v. *Petroleum Conversion Corp.* (1950) 338 US 507, 508. In *Mississippi's* case the Commission, acting as the Court now orders, rejected and dismissed a filing under Section 4. There the Court of Appeals for the Third Circuit reasoned that the "face" of Section 4 gave the Commission only two alternative choices. To allow the changes to become effective by failure to act; or to enter upon a hearing and suspend for a maximum period of five months. Instead, reasoned the Court, "it purported to follow a third course, rejection without hearing — a course for which it cannot show even color of statutory authority." Statements in the Court's opinion that the *Mississippi* case is distinguished from this case are wholly inaccurate; the situation is precisely the same.[25]

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[25] The various grounds of distinction stated are clearly inaccurate. First, the plain language of Sec. 154.85 of the Commission's Rules is misconstrued. That part italicized by the court is inapplicable to this record. The language which should have been italicized as applicable here provides that the filed contract

> "* * * shall be considered as an executed service agreement to the extent the provisions thereof are not in conflict with other applicable provisions of the rate schedules * * *"

and that of the first proviso:

> "That the natural gas company, concurrent with the filing of the tariff, shall submit, for insertion in each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules * * *"

(See Fn 4, page 5 herein.)

Second, the surprising statement in the course of consideration of Section 154.85 that "There is no contention that the instant contract was changed by the conversion order replacing the percentage rate by a fixed rate" (Opinion Fn 16, App. 14).

Petitioner vigorously urged that the conversion tariff filed under requirement of Section 154.38(d) (3) (See Fn 4, p. 4-5, supra) which pro-

The record here shows that neither the "until" clause or the last proviso (italicized by the Court) has yet been reached as applicable to Respondent's contract. The required statement (R. 79-80) filed by Petitioner shows the contract rate provisions were not retained, thus could not have been the "existing filed contract" rate.

The Court then examined the dismissal and rejection of *Mississippi's* filing as being comparable to a motion to dismiss for failure to state a claim upon which relief could be granted, or a motion for summary judgment, and concluded the rejection improper because "The statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedures." (p. 902) It thereupon set aside the Commission's order on the ground that the dismissal was "wholly beyond the authority of the Com-

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hibited percentage rate clauses and tax adjustment clauses; the statement (R. 79-80) filed pursuant to Section 154.85 showing the vast and substantial changes in the contract; the Commission's order of August 1, 1952 in Docket G-2019 (R. 81) permitting the conversion tariff to be filed and become the effective filed rate schedule; followed by Respondent's failure to take an appeal under Section 19(b) of the Act; all conclusively showed the contract to be replaced and superseded by the conversion tariff and that such was res judicata, citing *Sunshine Anthracite Coal Company* v. *Atkins*, 310 US 381.

Third, the conclusion that "United's filing on June 24, 1953 did attempt to 'effect a change' in an unexpired contract without 'the execution of a form of service agreement contained in the tariff' ", based upon the misconception of Section 154.85 is wholly incorrect. Petitioner's filing of increased rates on June 24, 1953 in Docket G-2210 did not purport to effect a change in a contract, for that contract had not, as such, existed as a "filed contract" since July 3, 1952, the date of filing of the conversion tariff in Docket G-2019 (R. 81) approved by the Commission. Further, Section 154.85 has nothing to do with filing changed rates under Section 4 of the Act. Finally, the execution of a form of service agreement contained in the tariff required in the last proviso of Section 154.85 applies, as expressly stated, only to a change or amendment of that part of the contract which the first part of the Section kept as an executed service agreement. Increased rates did not purport to change or amend that part of the contract left; for such remaining part did not set a rate.

Fourth, and most important of all, the suggestion that there is a difference factually and contract-wise between this and *Mississippi's* case is without basis. The contract-conversion tariff situation between Mississippi River Fuel Corp., and its customer LaClede Gas Co. (202 F. 2d 904) was precisely identical to that here between Petitioner and Respondent. The public files and records of the Commission show: (1) Mississippi filed contract with LaClede dated October 2, 1947, which the Commission numbered as FPC Rate Schedule No. 26; (2) several amendments to this contract were filed prior to July 1, 1949; (3) on July 1, 1949 Mississippi filed its conversion tariff in compliance with Section 154.38(d) (3), also its statement pursuant

mission". This conclusion undoubtedly was right, for the Commission as the regulatory agent is possessed only of those powers expressly granted by the Act, and it possesses no inherent power by virtue of its existence.[26]

State and Federal Courts have also held that rates filed *ex parte* under the provisions of State Public Utility Statutes, taken from the Interstate Commerce Act and containing provisions substantially similar to Sections 4(d) and (e) of the Natural Gas Act, were the only lawful rates which

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to Section 154.85, which superseded the original contract; (4) the Commission permitted the conversion tariff to be filed. Thus, in 1953 when the Court below decided *Mississippi's* case the situation was precisely like that here. There is no doubt that the Court in *Mississippi's* case should judicially have known, and that this Court will take judicial knowledge and notice of these facts irrespective of whether they were a part of the record before that Court or not. See *Interstate Natural Gas Co.* v. *Southern Cal. Gas Co.* (1953, 9 Cir.) 209 F. 2d 380 (Judicial notice "of records and reports of Administrative bodies"—contracts on file and orders in collateral proceedings); *Washington Gas & Light Co.* v. *Baker* (D. C. Cir. 1951) 195 F. 2d 29, 35 (application for rate increase filed since argument of the appeal); *Fletcher* v. *Jones* (1939, D. C. Cir.) 105 F. 2d 58, 61-2, and cases in Fn 14, p. 61, cert. den. 308 US 550 (Records and Reports of Home Owners Loan Board and Home Owners Loan Corporation "even though formal proof thereof" not made below); *Colonial Air Lines Inc.* v. *Janis* (1953 2d Cir.) 202 F. 2d 914, 919, Fn 1 (Press release on action of CAB which court characterized "official action by a federal regulatory agency, not a part of the record below"); *NRLB* v. *Atkins & Co.* (1947) 331 US 398, 406, (Circular or regulations not offered in evidence before the Board); *Savannah River Electric Co.* v. *Federal Power Commission* (1947, 4 Cir.) 164 F. 2d 408, 410 ("Public Records" including letters between executive branches of the Government reports to Congress, Presidential Orders, contracts of Governmental agencies, most occurring after Commission action); *Greeson* v. *Imperial Irrigation District* (1932, 9 Cir.) 59 F. 2d 529, 531 ("Public Facts," "Geographical Positions," "Public Activities within Common Experience"); *Arizona* v. *California* (1895) 283 US 665, 670, (Navigability of a part of the Colorado River); *Tucker* v. *Texas* (1945) 326 US 517, 519.

Finally, the statement that in *Mississippi's* case the Court assumed Commission authority to reject a filing not conforming to its rules and citing Section 154.24. But the assumption was strictly limited to matters of form, i.e., "power to require schedules and supporting data to be organized or broken down into convenient and readily comprehensible form" (p. 902). The Court then tested the assumption as well as the Commision action by comparing it to motions to dismiss for failure to state a claim, or motion for summary judgment, repudiating any power for summary rejection so comparable by rightly concluding that "the statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedures" (p. 902).

Thus, Section 154.24 (Op. Fn 17, App. 15) which was in existence and subject to judicial knowledge of the court at the time of such decision was not deemed grounds for affirming rejection nor does the opinion indicate the Commission so urged. Obviously this also applies only to form.

[26] *Electric Power & Light Co.* v. *S.E.C.* (1946) 329 US 90, 106, *Douglas* v. *Noble* (1923) 261 US 165, 167, 169, 170.

might be filed, and to the extent that rate provisions of any existing contract between utility and a consumer provided for a rate different from the rate so filed, such contract was void.[27]

II.

The Court also concluded that all monies collected on the basis of the "erroneous order" were "unlawfully collected" and should be returned to Respondent.[28] In so holding, the Court below is in conflict with the holdings of this Court and of the Fourth and Eighth Circuits, that under the Act the Commission has no power to make reparations, for its power to fix rates admittedly is limited to those "to be hereafter observed and enforced". *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 US 591, 618; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 US 246, 251; *Hope Natural Gas Co.* v. *Federal Power Commission* (1952, 4 Cir.), 196 F. 2d 803, 805; *Hope Natural Gas Company* v. *Federal Power Commission* (1943, 4 Cir.), 134 F. 2d 287, 311, reversed on other grounds 320 US 591; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (1907), 204 US 426, 439; *Northern Natural Gas Co.* v. *F. P. C.* (August 17, 1954, 8 Cir. No. 14706 and 14733), pg. 11, 13 of Opinion not yet reported.

Clearly the Commission has no power under Section 4(e) to order refund of monies collected pursuant to rates for the sale of gas for resale for industrial use only. In so ordering here the Court below goes entirely outside the Act. The rationale of its opinion in *Mississippi River Fuel Corp.* v. *Federal Power Commission* (1953), 202 F. 2d 899,

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[27] *North Hempstead* v. *Public Service Corp.* (1921) 231 NY 442, 132 NE 144; *Public Service Commission* v. *Pavilion Natural Gas Company* (1921) 232 NY 143, 133 NE 427; *Kansas City Power & Light Co.* v. *Midland Realty Co.* (1936) 338 Mo. 1141, 93 SW 2d 954, affirmed *Midland Realty Co.* v. *Kansas City Power & Light Co.* 300 US 109; *Suburban Water Co.* v. *Borough of Oakmont* (1920) 268 Pa. 243, 110 A. 778; *Duquesne Light Company* v. *Public Service Commission* (1922) 273 Pa. 287, 117 A. 63; *Leiper* v. *Baltimore & P.R. Co.* (1918) 262 Pa. 328, 105 A. 551; *V & S Bottle Co.* v. *Mountain Gas Co.* (1918) 261 Pa. 523, 104 A. 667, appeal dismissed 251 US 544; *Harrison Electric Co.* v. *Citizens Ice & Storage Co.* (1921) 149 Ark. 502, 232 SW 932; *Colton* v. *Commonwealth Edison Co.* (1953) 349 Ill. App. 490, 111 NE 2d 363, 366.

[28] Second question presented.

was that the Commission's authority and power were limited to provisions of the Act. After discussion and analysis, it concluded that familiar judicial concepts furnished no basis for Commission exercise of analogous authority, because the statute "which defines the powers of the Commission in natural gas matters makes no provision for any such procedures." Yet, here the Court bases its decision on the theory of analogy of judicial concept which is inconsistent with the holding in *Mississippi's* case.

In going outside the bounds of the Act contrary to the rationale of its opinion in *Mississippi's* case, it has reached a result which requires the Commission to exercise a power not defined or granted to it in the Act. Since the Commission is possessed only of power delegated to it by the basic Act and has no power that is inherent by virtue of its existence,[29] it follows that the Court is without authority to so order.[30] Courts may not substitute their judgment and discretion for matters committed to the discretion of the Commission.[31]

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[29] *Douglas* v. *Noble*, 261 US 165, 167, 169, 170; *American P. & L. Co.* v. *SEC*, 329 US 90, 106.

[30] In *Northern Natural Gas Company* v. *FPC* (opinion No. 14706 and 14733, not yet reported) the 8th Circuit speaking of the want of power in a court to require the Commission to order reparations, said:

"It is pointed out that in rate regulation such as is here involved, the Commission's legislative fixing of rates must necessarily relate to the future and the Commission lacks power to grant reparation where a rate has proved on application to be confiscatory. The court also is limited strictly to the exercise of judicial power and has no power to fix rates or to accord reparation on account of insufficiency of rates in the past. In the process of rate regulation, therefore, the utility must propose a change in the rates under which it is operating and the Commission allows or disallows the change. It is the allowance or disallowance that is subject to review by the Court. There is no place in the proceeding for either the Commission or the Court to accord reparation."

[31] *Algoma Coal & Coke Co.* v. *US* (D.C. Va. 1935,) 11 F. Supp. 487; *Carlsen* v. *U.S. et al* (D.C.N.Y. 1952) 107 F. Supp. 398; *Merchant Truckmen's Bureau of New York* v. *U. S.* (D.C.N.Y. 1936) 16 F. Supp. 998; *Manhattan Transit Co.* v. *U. S.*, 24 F. Supp. 174; *Board of Railroad Commissioners* v. *Great Northern Railway Co.* (1929) 281 US 412; and cases cited in Fn 17, p. 16.

Conclusion

The questions discussed above are believed to involve questions of Federal law which individually are of such importance to the future administration and application of the Natural Gas Act that they should be settled by this Court. Petitioner submits that the decision below so emasculates and destroys the even and equal application of the Act in accordance with the Congressional intent as to reach a result which it believes to be inconsistent with the decisions of this Court and to call for an exercise of this Court's power of review.

In the recent decision by this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 US 246, 251, this Court said:

> "But the prescription of the statute is a standard for the Commission to apply, and, independently of Commission action, creates no rights which courts may enforce.
>
> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion.
>
> "It can claim no rate as a legal rate that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms. * * * the right to a reasonable rate is the right to the rate which the Commission files or fixes * * *."

It is believed that the Court below has completely disregarded this clear admonition that Congress has entrusted administration to the Commission, and that the courts may not authorize commerce in natural gas at any rate other than the rate made "specific by the Commission", i.e., the filed rate, whether fixed or merely accepted by the Commission, and has substituted its own judgment for that of the

Commission and directed action clearly outside the bounds of the basic Act.

It is accordingly urged that a writ of certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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